SUPREME COURT, U.S.

MAY 3 1958

JOHN T. ... Y, Clerk

IN THE

Supreme Court of the United States

October Term, 1957 No. 70

ROBERT RANDALL,

Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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Your petitioner, Robert Randall, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered in the above entitled case.

OPINIONS BELOW

The opinion of the Trial Court, the Court of Quarter Sessions of Northampton County, Pennsylvania, is unreported — a copy is printed on pages 242 to 265 of the record. The opinion of the Superior Court of Pennsylvania is reported at 183 Pa. Superior Ct. 603, 133 Atlantic 2d 276. The Supreme Court of Pennsylvania denied an appeal without opinion by entry of the following order: "October 10, 1957. Petition Denied. Per Curiam." (Appendix p. 41)

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of 28 U.S. Code Annotated, Section 1257.

Petitioner, Robert Randall, was sentenced by the Court of Quarter Sessions of Northampton County, Pennsylvania, on October 22, 1956 to a prison term of one to three years and a fine of One Hundred ($100.00) Dollars. This sentence followed conviction by a jury on February 16, 1956 of the crime of "corrupting the morals of a child under the age of eighteen years," Pennsylvania Laws, Act of June 3, 1953, P.L. 277, Sect. 1, 18 Purdons Statutes, Sect. 4532.

An appeal from the sentence of the Court was filed November 1, 1956 with the Superior Court of Pennsylvania, Philadelphia District. That Court, on June 11, 1957 filed

its opinion affirming the sentence. Subsequently, on June 20, 1957, petitioner filed in the Supreme Court of Pennsylvania, Eastern District, a Petition for Allowance of Appeal from the Decision of the Superior Court to the Supreme Court. This petition was denied October 10, 1957

QUESTION PRESENTED FOR REVIEW

1. Does Pennsylvania Act of June 3, 1953, P.L. 277, Sect. 1, violate the due process clause of Section 1 of the Fourteenth Amendment to the United States Constitution for the reason that its provisions are vague and indefinite and do not apprise the public of the nature of the prohibited act, in that the sole definition of a misdemeanor is an act "which corrupts or tends to corrupt the morals of any child under the age of eighteen years"?

COMMONWEALTH OF PENNSYLVANIA
STATUTORY PROVISIONS

"Whoever, being of the age of twenty-one years and upwards, by any act corrupts or tends to corrupt the morals of any child under the age of eighteen years, or who aids, abets, entices or encourages any such child in the commission of any crime, or who knowingly assists or encourages such child in violating his or her parole or any order of court, is guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine not exceeding one thousand dollars ($1000) or undergo imprisonment not exceeding three (3) years or both.

"A conviction under the provisions of this section may be had whether or not the jurisdiction of any juvenile court has attached or shall thereafter attach to such child or whether or not such child has been adjudicated a delinquent or shall thereafter be adjudicated a delinquent.

"In trials and hearings upon charges of violating the provisions of this section, knowledge of the minor's age and of the court's orders and decrees concerning such minor shall be presumed in the absence of proof to the contrary."

Act of June 3, 1953, P.L. 277, 18 P.S., sec. 4532.

STATEMENT OF THE CASE

Robert Randall was indicted and convicted of "corrupting the morals" of children under the age of eighteen as a result of a party which took place at his home in the afternoon of August 19, 1955. Present at various times during that afternoon were four other adults and six children ranging in age from 12 to 17 years. All witnesses agreed that beer and whiskey were available to the children. The testimony of Charles Tomsic and his sister Geraldine, though not corroborated by other witnesses, was to the effect that Randall was wearing a pair of pajama pants torn in such a way that his private parts were visible. One witness, Geraldine Tomsic, 16 years of age, at first denied that Randall had asked her to have sexual intercourse with him (R. 49), but after the District Attorney had pleaded surprise and been allowed to cross-examine her, she stated that Randall had asked three of the girls to have intercourse with him (R. 53). This was not corroborated by any one of the other ten eye witnesses, nor was her statement that Randall asked several of the girls to sit on his lap (R. 43).

In charging the jury as to the definition of the crime of "corrupting the morals" the Trial Court read the pertinent provisions of the Statute and gave to the jury the dictionary definition of the words "corrupt" and "tend" (R. 206). No further instructions were given to the jury as to any legal standard of morality in the community.

Two other questions were raised in the Courts below—The first related to an interpretation of the statute making

it a misdemeanor to furnish liquor to minors, an offense of which Petitioner Randall was also convicted on the same facts. The second concerned an error in the restriction of cross-examination of Homey Smickley which was held by the Courts below to be harmless error. Neither question is pertinent to this petition.

HOW CONSTITUTIONAL QUESTION WAS RAISED

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1. Motion in Arrest of Judgment filed with the Trial Court on February 20, 1956 (R. 233):

> "Defendant was deprived of due process of law as required by Section 1 of the 14th Amendment of the Constitution of the United States, because the offense of corrupting or tending to corrupt the morals of any child under the age of 18 years, as contained in the Act of June 3, 1953, P.L. 277, Sect. 1, Title 18 Purdons Statutes, Sect. 4532, does not define a crime with sufficient standard so as to apprise defendants of the nature of prohibited acts."

The matter was subsequently argued and the due process question was treated at length in the opinion of the Court of Quarter Sessions of Northampton County, Pennsylvania, written by the trial judge (R. 244-252). The Court concluded,

> "It is our considered judgment that the statute under consideration, when viewed in its proper setting, is not unconstitutional for lack of precise standards. There can be no basically valid disagreement in civi-

lized society as to what acts 'corrupt or tend to corrupt' the morals of children." (R. 251-252)

2. On appeal to the Superior Court of Pennsylvania, the following question was presented:

> "1. Is the Act of June 3, 1953, P.L. 277, Sect. 1, which makes it a crime 'to commit an act which corrupts or tends to corrupt the morals' of any child under the age of eighteen, in violation of the Fourteenth Amendment to the United States Constitution?"

3. Petition to Supreme Court of Pennsylvania for allowance of appeal from Superior Court of Pennsylvania (Appendix, page 33):

> "3. That the questions upon which the present petition is based are the same questions presented before the Superior Court of Pennsylvania and are as follows:
>
> "(a) 'Is the Act of June 3, 1953, P.L. 277, Sect. 1, which makes it a crime 'to commit an act which corrupts or tends to corrupt the morals' of any child under the age of eighteen, in violation of the Fourteenth Amendment to the United States Constitution?'"

* * * * * *

ARGUMENT

Does the declaration of any "act" as a crime if it "corrupts or tends to corrupt the morals of a child", provide a sufficiently definite test to ascertain guilt or innocence? That, concisely, is the question in this case.

Robert Randall was convicted of the above-defined crime on the basis of an indictment which was framed almost totally and without further elaboration, in the statutory language (R. 14).

Briefly stated, it is his contention that the words of the statute, in the light of the construction given them by the Pennsylvania Courts, are so vague and indefinite that they do not furnish the accused the essentials of due process.

The broad general constitutional principles involved have been stated many times by your Honorable Court. Illustrative is *Connally v. General Const. Co.*, 269 U.S. 385, 46 S. Ct. 126, 70 L. Ed. 322 (1926), where the principle is stated as follows:

> ". . . a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law . . ."

Further guideposts are contained in the same case as to the application of the general principles. In those cases where statutes have been held sufficiently certain, the words or phrases involved had either of two characteristics: the

first being a technical or special meaning well enough known for those concerned to correctly apply, and the second being a well-settled common-law meaning.

Additional tests are stated in *Winters v. New York*, 333 U. S. 507, 68 S. Ct. 665, 92 L. Ed. 840 (1948):

> "The vagueness may be from uncertainty in regard to persons within the scope of the Act . . . or in regard to the applicable tests to ascertain guilt."

Application of the foregoing tests finds the Pennsylvania Statute in question wanting in certainty. It is not asserted that there is any vagueness with respect to the persons within the scope of the Act—"Whoever, being of the age of twenty-one years and upwards". It is, however, argued that the statute fails to meet any of the other tests. This should be most easily demonstrated with regard to the first test as to whether or not the words have a technical or special meaning.

The sole definition of the nature of the crime as charged to the jury by the Trial Court is contained in one paragraph (R. 206a) wherein the Court read to the jury the dictionary definition of the words "corrupt" and 'tend". Not one word as to the legal standard of morality in the community is contained in the charge. Obviously, resort to dictionary definitions would not occur in the case of technical words or those with a special meaning.

Mention of the moral standards of the community is contained in the opinion of the Superior Court:

> "It should be remembered that we are not here dealing with a *moral* concept about which our people widely differ; corrupting the morals of children is

condemned throughout our land". (Appendix p. 24—Emphasis added).

The use of the words "moral concept" indicates that the Superior Court was thinking in moral terms about the certainty of the statute, whereas Petitioner was urging that there was no definite "legal standard" contained in the statute.

The situation is further compounded because later in the same paragraph of the opinion (Appendix p. 24) the Superior Court infers that the word "immoral" has legal meaning per se— in other words is synonymous with "illegal":

> "... Our Federal and State Constitutions assume that the moral code which is part of God's order in this world, exists as the substance of society. The people of this State have acted through their legislature on that assumption. We have not so cast ourselves adrift from that code nor are we so far gone in cynicism that the word 'immoral' has no meaning for us. Our duty, as a court, is to uphold and enforce the laws, not seek reasons for destroying them."

Whether or not the above-quoted language may be considered somewhat impaired as authority, because it is almost exactly a quotation from the concurring opinion in *Commercial Pictures Corp. v. Board of Regents, etc.*, 305 N.Y. 336, 113 N.E. 2d 502, at page 510, a case later reversed at 346 U.S. 587, 74 S. Ct. 286, 98 L. Ed. 329 (1954), is not of relative importance here. (It is interesting to note that the *Commercial Pictures* case was considered by the Supreme Court of Pennsylvania as authority that the words "immoral" and "tend to debase or corrupt morals"

were vague and indefinite in a motion picture censorship statute. *Hallmark Productions, Inc. v. Carroll*, 384 Pa. 348, 121 A. 2d 584 (1956)). However, it is respectfully submitted without any sacrilegious intent, that reference to a "moral code", part of "God's order", as having been assumed into the Constitution does not confer any greater certainty on the statute here attached. On the contrary, it adds to the confusion which was created by enactment of the statute.

Reference to "morals" in terms of "God's order" would imply an immutable code given to us by divine hand, requiring no further definition in day to day application. Yet the Superior Court recognized that morals change with times and conditions (Appendix 25).

A simple example will illustrate that the words of the statute do not convey definite ideas of the prohibited acts: If it is assumed, arguendo, that immediately before the enactment of the "corrupting" statute, it was not a crime in Pennsylvania for a man over 21 to request intercourse with a girl over 16 (age of consent), did it become obvious immediately upon enactment that this statute prohibited such conduct? Yet, that is one of the facts upon which Petitioner was convicted. The example also illustrates that "immorality" is not necessarily "illegality" since we may assume that in most circles a request of intercourse would have seemed "immoral" even before the passage of the corrupting act. It is questionable whether it would have been deemed "illegal".

The contention that the words of the statute have a well-settled common law meaning is ruled out specifically by the further provisions of the statute. The language

following establishment of corrupting the morals as a crime states:

> ". . . *or* who aids, abets, entices or encourages any such child in the commission of any crime." (Emphasis supplied.)

The crime of corrupting the morals is thus a new crime, not previously defined, since known crimes are covered in the later clause. It is also obvious that the several references in the opinion of the Superior Court to changing moral standards in the community rule out any consideration that the words of the statutes were construed as having a common-law meaning, even though there is a reference to the general principle that the common law punished whatever outraged public decency or morals. A group of specific common law crimes are obviously based on this general principle. A mere statement of the principle does not however make for certainty as to particular conduct.

The remaining test, as indicated in *Winters v. New York*, supra, is whether or not the applicable tests to ascertain guilt are vague. It is respectfully submitted that the statute could not be more vague as to this requirement. There is not even an indication whether the act must be done with criminal intent. The scope of conduct which could conceivably be prohibited is so broad as to render the statute meaningless. This latter point has already been demonstrated in a related field of legislation—the statutes making conduct criminal which contributes to the delinquency of a minor. Such have been considered relevant by both the Trial Court (R. 248) and the Superior Court (Appendix 26). There are no apparent limits to the scope of the "delinquency" acts, as evidenced by a few sample cases:

State v. Davis, 58 Arizona 444, 120 P. 2d 808 (1942) (A father convicted for encouraging child to refuse to salute the American flag because of religious scrupies);

State v. Scallan, 201 La. 1026, 10 So. 2d 885 (1942) (accused permitted daughter under 17 to go to a nightclub);

In re Lewis, 193 Misc. 676, 84 N. Y. Supp. 2d 790 (1948) (Defendant owned bowling alley and employed 15 year old boy to work. Boy saw money placed in desk and stole it.)

Moreover the "delinquency" acts have been disapproved by responsible authority in the field of youth welfare, largely on the ground that their scope is too broad:

> ". . . No recommendation is made that there be a statutory crime of contributing to the delinquency or neglect of a minor. Many of the . . . statutes now on the books are phrased so broadly that . . . the variety of types of adult conduct which might be found to constitute criminal conduct are indefinite and more than are needed to protect children adequately."
>
> U. S. Dept. of Health, Education and Welfare. *Standards for Specialized Courts Dealing with Children*, 35 (1954).

In the only case where a statute as broad as this "corrupting" statute has been construed by your Honorable Court, the legislative enactment has been found too vague. In that case, *Musser v. State of Utah*, 333 U.S. 95, 68 S. Ct. 397, 92 L. Ed. 562 (1948), several defendants were indicted under a statute prohibiting conspiracy "(5) to commit any

act injurious . . . to public morals." The statute was held prima facie void as vague and uncertain but the case was remanded to the State court, so that court would have the opportunity to construe the words. The State court later held the words could not be construed beyond their general meaning. Your Honorable Court said:

> "In some states, the phrase 'injurious to public morals' would be likely to punish acts which it could not punish in others because of the varying policies on such matters as use of cigarettes or liquor and the permissibility of gambling. . . . Statutes defining crimes may fail of their purpose if they do not provide some reasonable standards of guilt."

The *Musser* case was distinguished below on the ground that the prohibitions of the Utah Statute were much broader, since conspiracy was also prohibited which was injurious to public "health" or "trade" or "commerce". This may have been true of the statute but seems not to have been the rationale of the decision. See, for example, the construction of the *Musser* case in *State v. Vallery*, 212 La. 1095, 34 So. 2d 329 (1948).

Furthermore it does not seem that narrowing the scope of the statute to deal with the morals of children under the age of 18 would make for more certainty than injury to "public morals." It may be said that there is some unanimity of opinion as to moral standards for very young pre-adolescent children, a subject on which the common law developed many specific crimes. On the other hand there is no broader and more antagonistic difference of opinion than between the advocates of strict control and the advocates of self-determination for the adolescent and teen-ager. The variations of definitions as to moral conduct

on such subjects as drinking, dating, petting, gambling, etc. in these groups are infinite, and the pinpointing of a "community standard" would probably reflect only the combined moral judgment of a single jury, not necessarily drawn from a cross-section of the community.

It is precisely in an area of private morality that these battles of opinion are fought. The failure of this "corrupting" statute is that it invades this area of private morality or immorality, as it were, because of its failure to set a standard. Perhaps it cannot be more clearly indicated than by pointing out that the word "moral" has often been used to contrast with "legal", and is so associated in the public mind. Could the same members of the public as a jury be said to be applying a "legal" standard when they have all their lives used the word "moral" as meaning something different than "legal."

The difference between "legality" and "morality" has also preoccupied legal philosophers and judges. Roscoe Pound, *Law and Morals* (University of North Carolina Press, 1924) especially at pages 101, 102; Morris R. Cohen, *Law and the Social Order* (Harcourt, Brace and Company, New York, 1933) especially at page 348; Benjamin N. Cardozo, *The Paradoxes of Legal Science* (Columbia University Press, 1928) especially at page 37.

The words of Mr. Justice Holmes in an address entitled "The Path of the Law" put most precisely the argument here made as to the distinction between morality and law:

> "The first thing for a business-like understanding of the matter is to understand its limits, and therefore I think it desirable at once to point out and dispel

a confusion between morality and law, which sometimes rises to the height of conscious theory, and more often and indeed constantly is making trouble in detail without reaching the point of consciousness. You can see very plainly that a bad man has as much reason as a good one for wishing to avoid an encounter with the public force, and therefore you can see the practical importance of the distinction between morality and law. A man who cares nothing for an ethical rule which is believed and practiced by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can."

Oliver Wendell Holmes, *Collected Legal Papers*, (Harcourt, Brace and Company 1921) at pages 169-170.

Petitioner prays that a Writ of Certiorari be granted by your Honorable Court.

Respectfully submitted,
HERBERT FISHBONE,
And
JUSTIN D. JIROLANIO,
Attorneys for Petitioner.

APPENDIX

ORDER OF THE COURT OF QUARTER SESSIONS OF NORTHAMPTON COUNTY, PENNSYLVANIA

"AND NOW, October 8, 1956, defendants' motions in arrest of judgment and for a new trial are severally overruled, and the district attorney is directed to notify the defendants to appear in Court on Oct. 22nd, 1956, at 1:30 p.m., for sentence. Per Curiam W.G.B."

OPINION OF THE SUPERIOR COURT OF PENNSYLVANIA

(Reported at 183 Pa. Superior Ct. 603, 133 Atlantic 2d 276)

Opinion by Ervin, J., June 11, 1957:

Defendant, Robert Randall, was found guilty under the Act of June 3, 1953, P.L. 277, §1, 18 PS §4532, which provides: "Whoever, being of the age of twenty-one years and upwards, by any act corrupts or tends to corrupt the morals of any child under the age of eighteen years . . . is guilty of a misdemeanor. . . ." Defendants, Robert Randall and Sophie Wofsy, were also found guilty of violating Paragraph 1, §493, of the Liquor Code, 47 PS §4-493, which provides: "It shall be unlawful (1) For any licensee or the board, or any employe, servant or agent of such licensee or of the board, or any other person, to sell, furnish or give any liquor or malt or brewed beverages, or to permit any liquor or malt or brewed beverages to be sold, furnished or given to any person visibly intoxicated, or to any insane person, or to any minor, or to habitual drunkards, or persons of known intemperate habits." The cases were tried together, the charges against both defendants having arisen out of the same circumstances and at the same time. Defendants' motions in arrest of judgment and for new trial were denied and sentences were imposed upon the defendants, whereupon the instant appeals were taken by both defendants.

Defendant Randall argues that the above referred to act of 1953 is so vague and indefinite that it violates the

due process clause of the 14th Amendment to the United States Constitution, which provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." It is undoubtedly the law that to comply with this requirement of the Constitution "a statute must be sufficiently certain and definite to inform the citizen of the acts it is intended to prohibit. A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess as to its meaning and differ as to its application lacks the first essential of due process of law." 14 Am. Jur., Criminal Law, §22; Com. v. Klick, 164 Pa. Superior Ct. 449, 453, 65 A. 2d 440.

In support of his position, defendant Randall relies heavily on the case of Musser v. State of Utah, 333 U.S. 95, 68 S. Ct. 397, which involved a statute of the State of Utah prohibiting a conspiracy on the part of two or more persons "To commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice or the due administration of the laws . . ." Thirty-three persons were charged under this act with conspiring to encourage and practice polygamy. The entire statute was stricken down for being too vague and unenforceable. The court, in its opinion, stated: "It is obvious that this is no narrowly drawn statute. . . . Standing by itself, it would seem to be warrant for conviction for agreement to do almost any act which a judge and jury might find at the moment contrary to his or its notions of what was good for health, morals, trade, commerce, justice or order." It is apparent that the Musser case is not

authority for defendant's position that the phrase "corrupt the morals" is so vague and indefinite that it offends the due process clause of the Constitution. The statute in the Musser case related to acts deemed injurious not only to "public morals" but also to "public health . . . or to trade or commerce or for the perversion or obstruction of justice or the due administration of the laws." In the case at bar we are concerned only with the word "morals" as related to children under the age of 18 years. This is a much more definite and restrictive area than that which was involved in the Musser case. We believe that the word "morals" has a definite and well-settled meaning. Defendant Randall also placed great reliance upon the case of Hallmark Productions, Inc. v. Carroll, 384 Pa. 348, 121 A. 2d 584. In this case the Pa. State Board of Censors had refused to approve display of a motion picture, "She Should'a Said No," involving the enticement of people into the sale and use of marijuana. The board, under this statutory authority, found that the film was "indecent and immoral" and, in the judgment of the board, tended to debase and corrupt morals. In the majority opinion of the Supreme Court the language of the statute was found to be vague and indefinite and therefore unconstitutional. In the majority opinion written by Horace Stern, then Chief Justice, there will be found a review of the decisions of the Supreme Court of the United States on this subject.

The first case reviewed is Joseph Burstyn, Inc. v. Wilson, Commissioner of Education of New York, 343 U.S. 495. In that case a New York statute provided for the banning of a motion picture film if it or a part thereof was "obscene, indecent, immoral, inhuman, sacrilegious, or of such a character that its exhibition would tend to corrupt morals or incite to crime." The New York State Board

of Regents determined that a certain film examined by them was sacrilegious and ordered a rescission of the license to exhibit it. An affirmation of that order by the New York Court of Appeals was reversed by the Supreme Court of the United States. The appellant there argued (1) that the statute was a violation of the right of free speech and (2) that the term "sacrilegious" was so vague and indefinite as to constitute a denial of due process. The Burstyn opinion ends with a statement that "Since the term 'sacrilegious' is the sole standard under attack here, it is not necessary for us to decide, for example, whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films. That is a very different question from the one now before us. We hold only that under the First and Fourteenth Amendments a state may not ban a film on the basis of a censor's conclusion that it is 'sacrilegious.'" Chief Justice Stern then reviews the following cases: Gelling v. Texas, 343 U.S. 960; Winters v. New York, 333 U.S. 507; Superior Films, Inc. v. Department of Education, and Commercial Pictures Corp. v. Board of Regents of University of State of New York, 346 U.S. 587. In all of these cases censorship under state acts was stricken down by per curiam opinions citing merely the Burstyn case. At the very end of his opinion in the Hallmark case (p. 358) Chief Justice Stern states: "It need hardly be added that even if all pre-censorship of motion picture films were to be held invalid this would not in and of itself affect the right to suppress objectionable films if exhibited, or to punish their exhibitor." (Emphasis added). In his dissenting opinion, Mr. Justice Musmanno, at p. 367, states: "After the decision of the Majority will have been handed down, those same shameful, shameless, degrading films may be

projected anywhere in Pennsylvania publicly, the distributors and exhibitors being subject only, *after the showing, to the penalty provided under criminal law.*" (Emphasis added) We think it is clear that the Supreme Court in the Hallmark case intended to leave open the question of whether the legislature, by the use of clear language, could make it a crime to commit any act which would corrupt or tend to corrupt the morals of our youth. In this connection the language of Mr. Justice Musmanno in his dissenting opinion in the Hallmark case, at p. 371, is significant. He said: "However, there is nothing vague or uncertain about the words, 'obscene,' 'indecent,' and 'immoral.' There is nothing ambiguous about 'debasement and corruption of morals.' Any citizen with a fairly good education, excellent character, good religious upbringing, social consciousness and devotion to the ideals of democracy, can pass with satisfactory results on whether certain motion pictures are moral and proper."

In the censorship cases the courts were concerned not only with the question of whether the language in the statute was so vague and indefinite as to constitute a denial of due process but also with that part of the Constitution which has to do with the right of free speech. In the present case we are not concerned with the freedom of speech provision. We are concerned only with the question of whether the statute which prohibits any acts which corrupt or tend to corrupt the morals of a child under 18 years of age is sufficiently clear and definite to advise the public of the proscribed conduct.

It is interesting to note that appellant Randall did not question the sufficiency of the evidence relating to the charge made against him. Without going into great detail,

that evidence reveals that a party was held in defendant Randall's home, in the course of which some of the six minor children, whose ages ranged from 12 to 17 years, were served beer, whiskey and vodka and that the defendant Randall, clad only in the bottom of a pair of torn pajamas through which his private parts were visible to the minor children, invited several of the minors to sit on his lap, kiss him and have intercourse with him.

It should be remembered that we are not here dealing with a moral concept about which our people widely differ; corrupting the morals of children is condemned throughout our land. According to common understanding, the term "morals" must be taken to refer to the moral standards of the community, the "norm or standard of behavior which struggles to make itself articulate in law." Cardozo, Paradoxes of Legal Science, pp. 17, 41, 42. "Sound morals as taught by the wise men of antiquity, as confirmed by the precepts of the gospel . . . are unchangeable. They are the same yesterday and today." We see no reason to retreat from those ideas. "We are a religious people whose institutions presuppose a Supreme Being." Zorach v. Clauson, 343 U.S. 306, 313, 72 S. Ct. 679, 684, 96 L. Ed. 954. Our Federal and State Constitutions assume that the moral code which is part of God's order in this world, exists as the substance of society. The people of this State have acted through their legislature on that assumption. We have not so cast ourselves adrift from that code nor are we so far gone in cynicism that the word "immoral" has no meaning for us. Our duty, as a court, is to uphold and enforce the laws, not seek reasons for destroying them.

The comprehensive words of the statute, "whoever, being of the age of twenty-one years and upwards, by

any act corrupts or tends to corrupt the morals of any child under the age of eighteen years" certainly convey concrete impressions to the ordinary person. The common sense of the community, as well as the sense of decency, propriety and the morality which most people entertain is sufficient to apply the statute to each particular case, and to individuate what particular conduct is rendered criminal by it.

It is obvious that the mandates of the statute are salutary measures designed to protect children. "The ways and means by which the venal mind may corrupt and debauch the youth of our land, both male and female, are so multidudinous that to compel a complete enumeration in any statute designed for protection of the young before giving it validity would be to confess the inability of modern society to cope with the problem of juvenile delinquency." State v. McKinley, 202 P. 2d 964, 967, 53 N.M. 106; State v. Harris, 141 S.E. 637, 105 W. Va. 165. The general language of the statute, therefore, is not a valid objection to it on constitutional grounds. Unless words of such seeming generality as "moral" and "immoral" were valid in statutes, government itself would become impossible. Manifestly, there can be no objection to the use, in a statute, of words like "corrupts the morals" or "tends to corrupt the morals of any child," which include many things, all of which are intended by the legislature to be covered; otherwise, there would be barred from statutory use such customary verbiage as "fraudulent," "due," "negligent," "arbitrary," "reasonable," etc.

It is not a valid criticism that such general moral standards may vary slightly from generation to generation. Such variations are inevitable and do not affect the applica-

tion of the principle at a particular period in time: Parmalee v. U. S., 72 App. D.C. 203, 113 F. 2d 729. The highest court in the land has recognized that the "Use of common experience as a glossary is necessary to meet the practical demands of legislation" and that the "requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding." Sproles v. Binford, 286 U.S. 374, 393, 52 S. Ct. 581, 587, 76 L. Ed. 1167.

The constitutionality of similar statutes defining crimes in general terms has been upheld by many courts where the general terms used in the particular statute get precision from common standards of morality prevalent in the community.

The validity of statutes making it a crime to contribute to the delinquency of minors has been upheld in our own State and other jurisdictions: Com. v. Jordan, 136 Pa. Superior Ct. 242, 7 A. 2d 523; Com. v. Wink, 170 Pa. Superior Ct. 96, 84 A. 2d 398; Com. v. Siroik, 175 Pa. Superior Ct. 10, 102 A. 2d 239; People v. Friedrich, 52 N.E. 2d 120 (Ill.); State v. Montalbo, 110 A. 2d 572 (N.J.); State v. Roessler, 266 P. 2d 341 (N.M.).

The term "moral turpitude" has been held adequate to satisfy even the strict rule applicable to criminal statutes: Jordan v. DeGeorge, 341 U.S. 223, 232, 71 S. Ct. 703, 708. The term "good moral character" as used in the immigration and nationality laws has frequently been applied by the courts. The measure applied is the "common standard of morality" prevalent in the community: Estrin v. U. S., 2 Cir., 86 F. 2d 105; or the "common conscience"

of the community." Johnson v. U. S., 2 Cir. 186 F. 2d 588, 590.

We are convinced that the statute here involved was couched in language sufficiently clear and definite to proscribe the conduct of defendant Randall.

Section 493, subparagraph 1, of the Liquor Code of 1951, supra, provides: "It shall be unlawful (1) For any licensee or the board, or any employe, servant or agent of such licensee or of the board, *or any other person*, to sell, furnish or give any liquor or malt or brewed beverages, or to permit any liquor or malt or brewed beverages to be sold, furnished or given to . . . any minor. . . ." (Emphasis added) The defendants argue that under the *ejusdem generis* rule, the words "any other person" refer to persons in the same class as those enumerated, i.e., licensees or board or any employe, servant or agent of licensee or the board, and that defendants do not fall within any of these classes. The doctrine does not require that the general term "or any other person" be limited in its scope to the persons specifically enumerated. "The doctrine of ejusdem generis is but a rule of construction to aid in ascertaining and giving effect to the legislative intent, where there is uncertainty, and does not warrant the court in subverting or defeating the legislative will by confining the operation of a statute within narrower limits than intended by the lawmakers. If, on consideration of the context and whole law upon the subject, and the purposes sought to be effected, it is apparent that the legislature intended the general words to go beyond the class specially designated, the rule does not apply." 50 Am. Jur., Statutes, §250; see also Endlich on Interpretation of Statutes, §410; Com. v. Klucher, 326 Pa. 587, 591, 193 A. 28. In this connection

we quote with approval from the excellent opinion of President Judge Barthold: "When the above tests are applied to the statute in question it is obvious that there is no uncertainty in the meaning of the words employed by the legislature.

"The purpose of the Liquor Code is set forth in sec. 4(a), 47 P.S. sec. 1-104, as follows: 'This act shall be deemed an exercise of the police power of the Commonwealth for the protection of the public welfare, health, peace and morals of the people of the Commonwealth and to prohibit forever the open saloon, and all of the provisions of this act shall be liberally construed for the accomplishment of this purpose.'

"Sec. 102, 47 P.S. sec. 1-102, defines the word 'person' to mean 'a natural person, association or corporation.'

"Secs. 491, 492 and 493, 47 P.S. secs. 4-491, 4-492, 4-493, set forth in separate paragraphs the 'Unlawful acts relative to liquor, alcohol and liquor licensees,' the 'Unlawful acts relative to malt or brewed beverages and licensees,' and the 'Unlawful acts relative to liquor, malt and brewed beverages and licensees.' We deem it noteworthy that the legislature carefully differentiated between 'persons', 'licensees', 'manufacturers', etc., in its enumeration of prohibited acts. In some instances all 'persons' are prohibited from doing certain things; in other instances the prohibition applies only to licensees of various types or their 'servants, agents or employes' etc. This is a clear indication that the legislature intended that some of the prohibitions were to apply to all persons while others were to apply only to 'licensees', or 'their servants, agents or employes'.

"It is particularly significant that sec. 493 sets forth 25 prohibited acts relative to liquor, malt and brewed

beverages; and that the words 'or any other person' are included only in the subparagraph which makes it unlawful to sell, furnish or give any liquor or malt or brewed beverages to minors. It is significant also that minors are not the only class of persons to whom liquor or malt or brewed beverages may not be sold, furnished or given. Visibly intoxicated persons, insane persons, habitual drunkards and persons of known intemperate habits are similarly protected.

"We think that the legislature in using the words 'or any other person' deliberately selected these words in order to prohibit minors, visibly intoxicated persons, insane persons, habitual drunkards, and persons of known intemperate habits, from obtaining liquor, malt or brewed beverages, whether by purchase or gift, from licensees or any other persons. The intention of the legislature to protect the classes of persons named is the underlying consideration. If we were to restrict this section of the Act to 'licensees' or their 'servants, agents or employes,' we would nullify the very purpose of the Act."

We are convinced that both defendants were properly convicted under this portion of the Liquor Code.

The defendants also complain as to the restriction imposed by the lower court on the cross-examination of Homer Smickley as to his arrest, plea of guilty and sentence on charges similar to those made against the defendants. Homer P. Smickley was called as a Commonwealth witness. He had been indicted on two counts, the first charged him with corrupting the morals of children and the other charged him with furnishing intoxicating beverages to minors. The charges arose out of the same set of circumstances as the charges against defendants. When

the cases were called for trial the district attorney asked leave to "withdraw" the indictment on corrupting morals on the ground that the only evidence against Smickley was that he furnished liquor or beer. This motion was granted by the court. On examination by the district attorney, Smickley admitted that he was an inmate of Northampton County Prison on a parole violation and that he had pleaded guilty to a liquor violation in connection with the Randall case. When defendants' counsel attempted to cross-examine Smickley to show that he was also charged with "corrupting the morals" and that the charge had been withdrawn, and to question him on the circumstances under which the charge had been withdrawn, the court sustained objections to the cross-examination. It might have been better if the lower court had permitted a wider cross-examination. In Com. v. Mulroy, 154 Pa. Superior Ct. 410, 416, 417, 36 A. 2d 337, we said: "Of course, if the witness is under indictment for the same crime, or for a crime growing out of, or closely related to, the very offense for which the defendant is being tried, so as to form a part of the same occurrence or transaction, it is proper for the jury to know it, as bearing on the witness's interest in the immediate matter . . . 'When the co-indictee testifies for the accused, his situation here also may be considered as tempting him to exonerate the other accused and thus help towards his own freedom' (3 Wigmore on Evidence (3d Ed.) §967. So, too, if the witness, thus under indictment, testifies for the Commonwealth, it may be that his testimony was biased because given under promise or expectation of immunity or leniency from the officers conducting the prosecution being tried: . . . ; and the jury are entitled to know it." The questions and answers and comments of counsel in connection with the testimony of Smickley clear-

ly portrayed to the jury the nature of Smickley's connection with the cases under trial so that the jury could not have been under any misapprehension as to Smickley's interest, possible bias or prejudice or that his testimony may have been given with expectation of immunity, clemency or leniency. Moreover, the jury was adequately instructed that it should be satisfied upon the point of the truthfulness of his testimony and "should carefully and clearly scrutinize his testimony, accept it with caution, not only because of any interest that Homer Smickley might have, but because his testimony is evidence from a corrupt source, in view of the fact that he was an accomplice and pleaded guilty to the charge." The court also pointed out in its charge how the testimony of Smickley was corroborated by other evidence if the jury should believe that evidence. We are, therefore, of the opinion that the court's action constituted error in the abstract and that it is not sufficient to warrant a retrial where the conclusion is inescapable that this error did not influence the jury against the accused or deprive them of their right to a fair trial. Com. v. Barnak, 357 Pa. 391, 423, 424, 54 A. 2d 865; Com. v. Linkowski, 363 Pa. 420, 424, 70 A. 2d 278; Com. v. Felgoise, 129 Pa. Superior Ct. 74, 79, 194 A. 751; Com. v. Oldham, 178 Pa. Superior Ct. 354, 358, 115 A. 2d 895.

The judgments are affirmed and it is ordered that appellants appear in the court below at such time as they may be there called and that they be by that court committed until they have complied with their sentences or any part of them which had not been performed at the time the appeal was made a supersedeas.

JUDGMENT OF THE SUPERIOR COURT OF PENNSYLVANIA

"The judgments are affirmed and it is ordered that appellants appear in the court below at such time as they may be there called and that they be by that court committed until they have complied with their sentences or any part of them which had not been performed at the time the appeal was made a supersedeas."

PETITION FOR ALLOWANCE OF APPEAL FROM SUPERIOR COURT OF PENNSYLVANIA TO THE SUPREME COURT OF PENNSYLVANIA

To the Honorable, the Justices of the Said Court:

The petition of Robert Randall, Respectfully Represents:

1. The petitioner was the defendant in two indictments originating in the Court of Quarter Sessions of Northampton County, Pennsylvania, to Nos. 17 and 44 October Sessions 1955. The indictments charged him with violations of the Act of June 3, 1953, P.L. 277 §1, 18 Purdons Statutes §4532, and with the violation of Par. 1 of §493 of the Liquor Code of 1951, Act of April 12, 1951, P. L. 90 Art. XIV §493 as amended, 47 Purdons Statutes 4-493. The case was tried in conjunction with the case of Commonwealth v. Sophie Wofsy No. 17-B October Sessions 1955 before Judge Barthold and a jury, and, after a verdict of guilty, motions in arrest of judgment and for a new trial were duly filed. These motions were subsequently denied and an appeal was taken to the Superior Court of Pennsylvania as of Nos. 71 and 73 October Term 1957. The Superior Court affirmed the judgment and sentence in an opinion by Ervin, J., a copy of which is hereto attached and marked Exhibit "A".

2. The facts in the case are as follows:

The petitioner was charged with the violation of the above cited Acts which provide as follows:

"Whoever, being of the age of twenty-one years and upwards, by any act corrupts or tends to corrupt the morals of any child under the age of eighteen years . . . is guilty of a misdemeanor. . ." Act of June 3, 1953, P. L. 277 §1.

"It shall be unlawful—

(1) For any licensee of the board, or any employe, servant or agent of such licensee or of the board, or any other person, to sell, furnish or give any liquor or malt or brewed beverages, or to permit any liquor or malt or brewed beverages to be sold, furnished or given, to any person visibly intoxicated, or to any insane person, or to any minor, or to habitual drunkards, or persons of known intemperate habits." Liquor Code of 1951, Act of April 12, 1951, §493 Par. 1.

The indictments arose out of events occurring at Petitioner Randall's home near Wind Gap, Pa., on August 19, 1955. On that date there were present in his home Sophie Wofsy a divorcee over twenty-one years of age, Charles Tomsic age 17, Mrs. Geraldine Tomsic Miller age 16, Hermina Heatter age 12, Jack Marsh age 17, Emma Wentzell age 15, Esther Frable age 14, Homer P. Smiekley an adult, and 2 adult plumbers who were working at Randall's home.

The evidence reveals that some of the children were served beer, whiskey and vodka. Some of the witnesses also testified that the Petitioner Randall was clad only in the bottom of a pair of torn pajamas through which his private parts were visible, and that while so clad he invited several of the minors to sit on his lap and to kiss him. One witness testified that he asked three of the girls

to have intercourse with him. These facts were contradicted by other witnesses, but the jury apparently believed the testimony of Charles Tomsic, his sister Mrs. Geraldine Miller, and the testimony of Homer P. Smickley. In the course of the trial, the District Attorney pleaded surprise as to three witnesses, and over objection was permitted to cross-examine the witnesses and to quote portions of the statements which the witnesses had given before trial.

The jury returned a verdict of guilty on both charges and subsequent to the lower court's denial of motions in arrest of judgment and for a new trial, the petitioner was sentenced on the corrupting of morals charge to a term of one to three years and a fine of $100.00. With respect to the Liquor Code violation he was fined $300.00.

3. That the questions upon which the present petition is based are the same questions presented before the Superior Court of Pennsylvania and are as follows:

(a) Is the Act of June 3, 1953, P.L. 277, Sect. 1, which makes it a crime "to commit an act which corrupts or tends to corrupt the morals" of any child under the age of eighteen, in violation of the Fourteenth Amendment to the United States Constitution?

(b) Does the Pennsylvania Liquor Code, Act of April 12, 1951, Art. XIV, Sect. 493 apply to members of the general public without relationship to a licensee of the Liquor Control Board?

(c) When a witness, who has been indicted on two charges arising out of the same circumstances under which defendant is indicted, testifies for the Commonwealth, is it error to refuse to allow cross-examination of the witness as to the circumstances

under which one of the two charges has been withdrawn, and as to whether or not he has been sentenced?

4. That the reasons for requesting allowance of appeal are as follows:

(A) *With respect to the Act of June 3, 1953 (Corrupting the morals of children)*—

(1) The case is one of first impression in Pennsylvania. No previous attack has been made on the constitutionality of this Statute.

(2) In distinguishing this penal statute from the Pennsylvania Movie Censorship Statute held unconstitutional in Hallmark Productions Inc. v. Carroll, 384 Pa. 348, 121 A. 2d 584, the Superior Court infers that a different and more strict standard of definiteness will be applied in cases involving freedom of expression than in cases involving criminal statutes. It is respectfully submitted that Hallmark Productions Inc. v. Carroll, supra, is not authority for such a proposition. On the contrary it would seem that the standard of construction would be more strict where a criminal statute is involved. Furthermore it appears that the Superior Court followed a liberal rule of construction as opposed to the usual strict rule when a penal statute is involved. The following language from the opinion will illustrate:

> "It is obvious that the mandates of the statute are salutary measures designed to protect children. . . . The general language of the statute, therefore, is not a valid objection to it on constitutional grounds. Unless words of such seeming generality as 'moral' and 'immoral' were valid in statutes, government itself would become impossible."

(3) The Superior Court's opinion fails to note one of petitioner's principal arguments. This argument was that the crime of corrupting the morals was intended by the Legislature as a new crime not previously known to the law. This is so because in the second clause of the same statute the Legislature made it a misdemeanor to aid, abet, entice or encourage "any such child *in the commission of any crime*" (Emphasis supplied). It was argued to the Superior Court that this second clause applied to all acts of a defendant which could have been the subject of an indictment at common law or are otherwise recognizable as statutory crimes. It was argued therefore that the crime of "corrupting the morals" is a new offense not previously defined.

(4) The opinion of the Superior Court fails to note the argument of petitioner that the statute delegates to the individual juror's standard of morality the definition of the crime of "corrupting the morals"—thus an unlawful delegation of power by the Legislature. This was exemplified by the Charge of the lower court which was restricted to dictionary definitions of the words "corrupt" and "tend" (R. 206a). The jury therefore had the duty in addition to finding the facts, of construing the legal standard to be applied in determining whether morals were corrupted. The Superior Court held only that the words of the statute "convey concrete impressions to the ordinary person."

(B) . *With respect to the construction of Paragraph 1, Sect. 493 of the Liquor Code of 1951*—

(1) The case is one of first impression in Pennsylvania appellate courts. The opinion of the Superior Court apparently overrules Commonwealth v. Dalton, 46 Luzerne

Leg. Reg. 77 (1956) where the Court had applied the rule of "ejusdem generis" in construing the meaning of the words "or any other person" in the section of the statute which provides as follows:

> "It shall be unlawful (1) for any licensee of the board, or any employe, servant or agent of such licensee or of the board, *or any other person* to sell. . ." (Emphasis supplied)

As these words are construed by the Superior Court, no notice is taken of the fact that of sixteen penal sections in the Liquor Code this section is the only one where the words "any . . . person" follow more limited classifications. In all other sections the Legislature used the words "It shall be unlawful—for any person."

(2) The question to be determined is of state-wide importance because as construed by the Superior Court the language of this section of the Liquor Code can be applied to convict a guest in a home whose only crime would be to pour a glass of beer for his host's eighteen year old son. This is not a stretching of the construction given the Act inasmuch as Sophie Wofsy, petitioner's co-defendant, was convicted under this section on the sole ground that while present as a guest in petitioner's home she poured drinks for other guests who were under twenty-one.

(3) The Superior Court applied a liberal rule of construction to the penal sections of the Liquor Code. This was done by quotation from the Liquor Code in part as follows: "All of the provisions of this Act shall be liberally construed for the accomplishment of this purpose." It is submitted that extension of the penal provisions of this section of the Liquor Code to members of the general public

should be accomplished only by clear and precise language to that effect by the Legislature. Reliance on a strict rule of construction with respect to this statute as is usual with regard to criminal statutes would likely have produced a different result in this case.

(C) *With respect to petitioner's motion for a new trial based on improper restriction of the cross-examination of Homer P. Smickley, a Commonwealth witness—*

The Superior Court ruled that the Trial Court's error in this regard was error in the abstract, and therefore not sufficient ground for reversal. Petitioner respectfully submits that this ruling is based upon an erroneous conception of what happened at the trial. Though the Superior Court recognized that the trial court had improperly restricted petitioner's counsel on cross-examination of Homer Smickley to show his bias or interest, the opinion of the Superior Court notes "the questions and answers and the comments of counsel in connection with the testimony of Smickley clearly portrayed to the jury the nature of Smickley's connection with the cases under trial. . ." Furthermore it was noted that Smickley's testimony was corroborated by other testimony in the case.

Two reasons are respectfully submitted as to why the trial court's error was reversible error. First, defendant's counsel were never permitted to show that Smickley had not yet been sentenced when he testified. Therefore the jury did not know all the facts upon which it could judge Smickley's testimony. As a matter of fact petitioner submits that it is error to consider that the jury was aware of Smickley's interest when the plain implication of a court's ruling refusing a line of cross-examination is that such examination would be improper. To say that the jury

was aware is to say that the jury ignored the plain meaning of the court's ruling.

Second, the opinion of the Superior Court considers that Smickley's testimony was corroborated. Yet the Commonwealth felt impelled to call Smickley as a rebuttal witness to testify solely to two facts on which there was a conflict in the evidence: (1) that petitioner Robert Randall was wearing pajamas rather than blue denim trousers; and (2) that petitioner Randall had asked him to get the beer and liquor after the children had arrived at Randall's home (R. 182a, 183a). If the Commonwealth at trial felt it necessary to expressly call Smickley for these purposes during the trial, it is difficult to understand how a Court can now say that the error of the trial court had no possible effect on the verdict. This especially in view of the fact that Smickley was the only adult eye-witness to testify for the Commonwealth of the five adults present in petitioner's home. His possible bias or interest was therefore extremely important.

5. That copies of the briefs and record filed in this case in the Superior Court accompany this petition.

WHEREFORE petitioner prays that he be allowed to appeal from the judgment of the Superior Court aforesaid to the Supreme Court of Pennsylvania.

ROBERT RANDALL

HERBERT FISHBONE

Attorney

State of Pennsylvania
County of Northampton, ss:

ROBERT RANDALL, being duly sworn according to law, deposes and says that he is the petitioner herein and that the statements made in the foregoing petition for allowance of appeal from the Superior Court to the Supreme Court are presented in good faith; that petitioner believes he has suffered injustice by the order from which he appeals, and that the said petition is not filed for the purpose of delay.

ROBERT RANDALL

Sworn to and subscribed before me this 19th day of June 1957.

ORDER OF SUPREME COURT OF PENNSYLVANIA

"October 10, 1957. Petition denied. Per Curiam."